Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Truth-in-Billing and Billing Format	)	CC Docket No. 98-170
	)	
National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-In-Billing	)	CG Docket No. 04-208

COMMENTS OF CTIA – The Wireless Association™

Michael F. Altschul
Senior Vice President, General Counsel

CTIA – The Wireless Association™
1400 16th Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 785-0081

June 24, 2005

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INTRODUCTION AND SUMMARY

CTIA – The Wireless Association™[1/] welcomes this opportunity to submit comments in response to the Commission's *Second Further Notice of Proposed Rulemaking* in the above-captioned docket.[2/] CTIA endorses the principle that wireless consumers are entitled to clear and non-misleading disclosures in customer billing statements. Three principles should guide the Commission as it develops truth-in-billing regulations governing the wireless industry. *First*, the Commission should continue to promote the vibrant competition that has been the hallmark of the wireless marketplace and served consumers so well. *Second*, a competitive market demands a flexible regulatory framework that allows carriers to make clear disclosures *without* mandating rigid rules that prescribe the format and wording of every bill. In adopting rules that require wireless carriers to communicate truthful information to their customers, the Commission should not constrain carriers' ability to introduce innovative products and services that are pro-competitive and benefit consumers. *Third*, the Commission's rules should be national in their scope. Consumers and carriers alike are best served by a uniform federal enforcement regime; indeed, any other approach necessarily conflicts with the first two principles.

1/ CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including cellular, broadband PCS and ESMR, as well as providers and manufacturers of wireless data services and products.

2/ *See* Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking, *Truth-in-Billing and Billing Format; National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing*, CC Docket No. 98-170, CG Docket No. 04-208, FCC 05-55 ¶ 43 (rel. Mar. 18, 2005) ("*Declaratory Ruling*" and "*Second FNPRM*").

In establishing a coherent set of national rules, the Commission should look first to the *CTIA Consumer Code for Wireless Services* ("*CTIA Consumer Code*"), which already requires clear, non-misleading disclosures in customer billing statements.[3/] The *CTIA Consumer Code* was adopted in September 2003 in partnership with a majority of the Nation's wireless carriers and with the encouragement of the Commission. Its standards, which already *go beyond* many of the Commission's proposals in the *Second FNPRM*, accommodate both the Commission's desire to protect consumers and carriers' need for flexibility. The *Code* accordingly should frame the Commission's inquiry as it considers regulation of wireless bills.

CTIA supports the Commission's proposal to require carriers to separate taxes and other government-mandated charges that carriers collect from customers and remit to the government from other charges in their billing statements. The Commission should avoid, however, dictating detailed requirements that constrain the ways in which carriers may design bills. Broad, non-prescriptive rules that require clear disclosures of necessary information strike the best balance between adopting regulations necessary to protect consumers and leaving the marketplace free to foster innovation, service and product differentiation, and the many other benefits of competition — all of which *also* serve consumer interests.

Any rules the Commission adopts should also be national in scope. It is essential that the federal regime not be undermined by a patchwork of inconsistent state regulations — or even inconsistent state *enforcement* of the federal rules. CTIA therefore agrees with the Commission's tentative conclusion in the *Second FNPRM* that "limiting state regulation of CMRS and other interstate carriers' billing practices, in favor of a uniform, nationwide, federal

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[3/] *See CTIA Consumer Code for Wireless Services*, *available at* http://www.ctia.org/wireless_consumers/consumer_code/index.cfm.

regime, will eliminate the inconsistent state regulation that is spreading across the country, making nationwide service more expensive for carriers to provide and raising the cost of service to consumers."[4/] To be sure, states have an important role to play in the regulation of billing through their neutral enforcement of rules of general applicability — such as contract and consumer protection laws — when that enforcement does not interfere with federal policies. But a set of parallel state truth-in-billing regulations would only undermine the policy determinations that the Commission makes at the national level. The Commission should therefore make clear that federal rules occupy the field of wireless billing regulation, and that *any* particularized state rules in this area would conflict with achievement of the national policy the Commission has outlined for the wireless industry.

I. CTIA SUPPORTS THE COMMISSION'S REASONABLE PROPOSAL TO REQUIRE CARRIERS TO SEPARATE GOVERNMENT-MANDATED CHARGES FROM OTHER CHARGES IN THEIR BILLING STATEMENTS.

In the *Second FNPRM*, the Commission tentatively concluded that requiring carriers to separate government-mandated charges from all other charges satisfies the Commission's policy goals of ensuring that carriers' descriptions of billed charges are "brief, clear, non-misleading, and in plain language."[5/] The Commission also suggested that this requirement "will strike a balance between some carriers' desires to explain that they incur costs associated with government programs, and the needs of consumers and regulators to assess bills accurately," and "will discourage a carrier from misleading consumers by recovering other operating costs as

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4/ *Second FNPRM* ¶ 52.

5/ *Id.* ¶ 43. *See also* 47 C.F.R. § 64.2401(b) ("Charges contained on telephone bills must be accompanied by a brief, clear, non-misleading, plain language description of the service or services rendered").

government mandated charges."[6] CTIA fully supports the Commission's efforts to require the straightforward disclosure of government-mandated and non-mandated charges on customers' bills. First and foremost, it will benefit consumers by ensuring that carriers' billing statements are clear and non-misleading, so that consumers can "reap the advantages of competitive markets."[7] At the same time, such a requirement will promote an open and balanced playing field for CMRS carriers, who are best able to compete on price when all bills clearly describe charges and services provided to customers.

Indeed, the *CTIA Consumer Code* already incorporates a requirement that carriers separate taxes and other government-mandated charges that are collected from customers and remitted to the government from charges that are not remitted to the government. The *Code* was adopted in September 2003 in partnership with the nation's wireless carriers and in direct response to the Commission's suggestion that voluntary wireless industry efforts were preferable to increased Commission regulation to protect and educate wireless consumers.[8] The *Code* represents the culmination of CTIA and its members' efforts to create industry-wide, nationwide guidelines to ensure that consumers make informed choices when purchasing wireless services. The *CTIA Consumer Code* is intended to "provide consumers with information to help them make informed choices when selecting wireless service, to help ensure that consumers understand their wireless service and rate plans, and to continue to provide wireless service that

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6/ *Second FNPRM* ¶ 43.

7/ *Id*.

8/ *See, e.g.*, "Best Practices 'Best Way' To Solve Wireless Problems, CTIA Told," Communications Daily, March 19, 2003.

meets consumers' needs."[9] In fact, the Code in many ways *goes beyond* the Commission's proposals. As the *Second FNPRM* notes,[10] the *CTIA Consumer Code* specifies that wireless carriers must "distinguish (a) monthly charges for service and features, and other charges collected and retained by the carrier, from (b) taxes, fees and other charges collected by the carrier and remitted to federal, state or local governments."[11] Such disclosures must be made in collateral or other disclosures at the point of sale, on their websites, and in their advertising (to the extent the medium allows). In addition, the Code specifically prohibits carriers from labeling cost recovery fees or charges as "taxes."[12]

But it is also important that a rule on point-of-sale disclosures be limited to requiring carriers to disclose the range of fees and charges and *not* require carriers to disclose the *exact amount* of each specific fee. This sort of *ex ante* precision is impracticable. Carriers are subject to a broad diversity of state and local taxes. Given these varied and changing rules, precise disclosures at the point of sale are simply impossible, and as long as the actual charge falls within the range the carrier has disclosed to the customer, the Commission should not impose a requirement that actual charges must fall within some specified percentage range of the estimate.[13]

The approach required by the *CTIA Consumer Code* strikes an appropriate balance between providing carriers with necessary flexibility to structure their bills in a manner that

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9/ *CTIA Consumer Code* Preamble.

10/ *Second FNPRM* ¶ 41.

11/ *CTIA Consumer Code*, Section 6.

12/ *Id*.

13/ *Second FNPRM* ¶ 55.

meets their customer and business needs and ensuring that their billing statements are clear and non-misleading.[14/] As noted above, the wireless carriers that have adopted the *Consumer Code* to date include both large and small, nationwide and regional service providers that serve a wide range of markets and offer an enormous variety of service plans.[15/] Their provision of clear information to customers has helped wireless consumers make informed choices about and comparisons between their wireless service options. At the same time, the *Code* has not required carriers to make dramatic or costly changes to their billing systems or customer billing statements. The *Code* accordingly represents an ideal balance, which the Commission should try to achieve in its own rules. Adoption of requirements along the lines of those required by the *Code* also would further the Commission's goal of favoring voluntary industry-sponsored responses to issues affecting the industry over Commission-mandated regulatory solutions.[16/] Consistent with the deregulatory mandates embodied in the Act and prescribed for CMRS

14/ We address in Part II, below, the Commission's specific questions concerning how to define government-mandated and non-mandated charges.

15/ As of June 8, 2005, the following wireless carriers have adopted and fully implemented the *CTIA Consumer Code*: Advantage Cellular; ALLTEL; AT&T Wireless; Caprock Cellular; CarolinaWest Wireless; Cellular One of East Central Illinois; Cellular South; Cincinnati Bell Wireless; Cingular Wireless; Dobson Communications; East Kentucky Network d/b/a Appalachian Wireless; Easterbrooke Cellular Corp.; Edge Wireless; Farmers Cellular Telephone, Inc.; First Cellular of Southern Illinois; Highland Cellular; Illinois Valley Cellular; Midwest Wireless; MobileTel, LLC; NTELOS; New-Cell; NEXTEL; Pioneer Enid Cellular; Rural Cellular; Southern LINC; Sprint; T-Mobile USA; Triton PCS; US Cellular; Verizon Wireless; Virgin Mobile USA; Virginia Cellular, LLC; and Western Wireless.

16/ *See, e.g.*, "FCC Chairman Michael Powell Statement on Wireless Industry Voluntary Consumer Code," News Release (rel. Sept. 9, 2003) ("Ultimately, voluntary efforts, like the code, are not only good for consumers; they are good for business too by improving the customer experience and encouraging subscription."); "Statement of Commissioner Kathleen Q. Abernathy in Response to CTIA Consumer Code for Wireless Service," News Release (rel. Sept. 9, 2003) ("At the end of the day, the industry's willingness to adopt a voluntary code of conduct avoids the need for costly regulatory oversight while delivering greater value to wireless customers.").

services in particular,[17] the Commission should prefer such an approach unless and until there is evidence that it proves inadequate.

II. TO THE EXTENT THE COMMISSION DECIDES TO ESTABLISH INDUSTRY-WIDE DEFINITIONS FOR GOVERNMENT-MANDATED AND NON-MANDATED CHARGES, IT SHOULD ADOPT THE APPROACH INCORPORATED IN THE *CTIA CONSUMER CODE*.

The *CTIA Consumer Code* should also serve as a model for the Commission as it considers whether to impose on carriers specific requirements with respect to the manner in which they define mandated and non-mandated charges and describe such charges on their billing statements. The *Code* has proven to be a reasonable, workable means of ensuring that carriers' billing statements are clear and not misleading, while at the same time ensuring that carriers retain the necessary flexibility to present billing charges to their customers in a manner that best serves their business and competitive needs.

A. General Rules to Govern the Definition of Charges Are Preferable to Specific Terminology or Labeling Requirements.

The *Second FNPRM* seeks comment on how the Commission should define the distinction between "mandated" and "non-mandated" charges for truth-in-billing purposes. Specifically, the FCC has asked whether it should define "government mandated" charges as amounts that a carrier is *required* to collect directly from customers and remit to federal, state or local governments (such as state and local taxes, federal excise taxes on communication services, and some state E911 fees). Further, it has asked whether "non-mandated" charges should be comprised of government authorized but discretionary fees that a carrier must remit pursuant to

[17] *See, e.g.*, 47 U.S.C. § 332(c)(1) (placing limits on the type of regulations that the Commission may impose on, and authorizing the Commission to forbear from applying Title II rate and service regulation to CMRS carriers).

regulatory action, but over which the carrier has discretion concerning whether and how to pass on the charge to the consumer.

To avoid confusion for both customers and carriers, the Commission should adopt a general rule defining the distinction between charges. Because "mandated" and "non-mandated" are imprecise terms, CTIA recommends the approach set forth in the *CTIA Consumer Code*, which distinguishes between those charges that are *remitted* to the government and those that are not. Specifically, the *Consumer Code* provides that

> On customers' bills, carriers will distinguish (a) monthly charges for service and features, and other charges collected and retained by the carrier, from (b) taxes, fees and other charges collected by the carrier and remitted to federal state or local governments. Carriers will not label cost recovery fees or charges as taxes.[18/]

This framework serves as a straightforward and workable distinction. As such, it benefits consumers, because it eliminates any confusion on their part as to the origin of specific line items on their bill. This approach also benefits carriers — many of whom have national rate plans — because it provides uniform, unambiguous guidance with respect to the manner in which customers' bills should be organized.

The straightforward definition used in the *CTIA Consumer Code* also is generally consistent with the disclosure obligations imposed by the settlement agreements between the Attorneys General from 32 states and Verizon Wireless, Cingular, and Sprint PCS (the "AVC Agreements"), although the *Consumer Code*'s framework is preferable because it provides carriers with needed flexibility for structuring their billing statements.[19/] The AVC Agreements

18/ *CTIA Consumer Code* Section 6.

19/ The only substantive difference between the *Consumer Code* and the AVC Agreements in this respect is the latter's reference to charges that a carrier is "required to" collect directly require that wireless carriers' bills "separate (i) taxes, fees, and other charges that [the carrier] is required to collect directly from [c]onsumers and remit to federal, state, or local governments . . . from (ii) monthly charges for [wireless services] and all other discretionary charges" and not represent that discretionary fees are taxes.[20] Adopting the rule set forth in the *Consumer Code* would therefore not represent a significant departure from the disclosure requirements *already* imposed on some of the largest CMRS carriers — or, of course, from the self-imposed requirements followed by the many carriers that voluntarily comply with the *Consumer Code* independent of any state requirements. Indeed, the Commission already has recognized the validity of the approach taken in the *Consumer Code* when it determined that CMRS providers who have committed to the requirements of the *Code* provide service quality that entitles them to receive ETC status.[21]

It is critical that the Commission *not* adopt a more restrictive or highly detailed set of rules regarding the distinction between charge types than that set forth in the *Code*. For example,

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from subscribers. CTIA believes that this distinction elevates form over substance, since in both cases such charges relate to regulatory fees that carriers are *required* to pay.

[20] *See* Letter from Kathryn A. Zachem, Counsel for Verizon Wireless, to Marlene H. Dortch, FCC, filed in CC Docket No. 98-170, Jan. 10, 2005 (Attachment – Assurance of Voluntary Compliance, at section F – "Disclosure of Taxes and Surcharges on Consumer Bills").

[21] *See, e.g.*, Order, *Federal-State Joint Board on Universal Service, Sprint Corporation, Application for Designation as an Eligible Telecommunications Carrier in the States of Alabama, Florida, Georgia, New York, North Carolina, Tennessee, and Virginia*, 19 FCC Rcd 22663, 22668 ¶ 12 (2004) (granting petitions for ETC designation in part because carrier "has committed in this proceeding to meet service quality standards, including those set forth in the [*CTIA Consumer*] *Code*"); Order, *Federal-State Joint Board on Universal Service, Advantage Cellular Systems, Inc., Petition for Designation as an Eligible Telecommunications Carrier in the state of Tennessee*, 19 FCC Rcd 20985, 20993 ¶ 19 (2004) (same); Order, *Federal-State Joint Board on Universal Service, ALLTEL Communications, Inc., Petitions for Designation as an Eligible Telecommunications Carrier in the states of Alabama, Florida, Georgia, North Carolina, and Virginia*, 19 FCC Rcd 20496, 20502-03 ¶ 15 (2004) (same).

the Commission should not impose specific terminology or standardized labeling requirements on carriers in connection with the presentation of specific charges on their customers' billing statements. The Commission's goal should be to adopt the approach that achieves its consumer protection goals with the least amount of regulation possible. This is certainly the approach favored by both Congress and the Commission: When Congress amended the Communications Act in 1993 to accommodate the growing market for wireless telecommunications services, it acknowledged that traditional Title II regulation might not be necessary to promote competition or protect consumers in the wireless marketplace.[22/] In implementing the Budget Act, the Commission followed suit, by seeking to adopt an appropriate level of regulation for wireless carriers and "establish[ed], as a principal objective, the goal of ensuring that unwarranted regulatory burdens are not imposed[.]"[23/] As the Commission itself has stated, "the statutory plan [of section 332(c)] is clear. Congress envisioned an economically vibrant and competitive market . . . . Congress delineated its preference for allowing this emerging market to develop subject to only as much regulation for which the Commission and the states could demonstrate a clear cut need."[24/] In short, as the Commission recently summarized in explaining its regulatory philosophy for CMRS carriers, it intends to rely "on market forces, rather than regulation, except

22/ *See* Second Report and Order, *Implementation of Sections 3(n) and 332 of the Communications Act — Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, 1418 ¶ 14 (1994) ("*Forbearance Order*") (implementing the amendments to the Communications Act embodied in the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b)(2)(A)–(B), 107 Stat. 312, 392 (1993) ("Budget Act"), and forbearing to apply many traditional Title II regulations to CMRS providers).

23/ *Forbearance Order,* 9 FCC Rcd 1411, 1418 ¶ 15.

24/ Report and Order, *Petition of the Conn. Dep't of Pub. Util. Control to Retain Regulatory Control of the Rates of Wholesale Cellular Serv. Providers in the State of Conn.*, 10 FCC Rcd 7025, 7031-32 ¶ 10 (1995), *review denied*, *Connecticut Dep't of Pub. Util. Control v. FCC*, 78 F.3d 842 (2d Cir. 1996).

when there is market failure."[25/] As long as the Commission's rules ensure that charges are clear and not misleading, nothing more is necessary or appropriate. In CTIA and its members' experience, the general distinction outlined above is sufficient to achieve that goal, and consumers have neither been misled nor confused; more specific terminology and/or labeling requirements clearly are not *necessary* to ensure that carriers' bills are clear and non-misleading.

It must be remembered that the market already provides a powerful check to billing statements that are not clear. Consumer confusion about billing statements leads to customer dissatisfaction, which, in turn, leads to churn. Even if billing problems do not lead a customer to seek a new carrier, calls to customer care centers are themselves expensive to carriers. As a result of these considerations, carriers have strong incentives to provide clear and non-misleading bills.

Any imposition on carriers of rigid terminology or structural requirements above and beyond the types of disclosure obligations found in the *CTIA Consumer Code* would be extremely difficult for most carriers to implement in practice and would in fact stifle competition in the CMRS marketplace. CTIA's members represent a very diverse group of wireless carriers, each with its own unique billing and marketing practices, often aimed at targeting different segments of the consumer marketplace. Differences in carrier billing systems, as well as in the customers various CMRS carriers serve, may require different approaches and would make implementation of a "one-size-fits-all" approach to customer billing statements cumbersome and costly without materially advancing the public interest. For example, many carriers have begun to offer bills in Spanish (and in some cases other languages) as they compete for customers in

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25/ *Orloff v. Vodafone Airtouch Licenses LLC, d/b/a Verizon Wireless*, 17 FCC Rcd 8987, 8998 n.69 ¶ 22 (2002), *pet. for review denied sub nom. Orloff v. FCC*, 352 F.3d 415 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 2907 (2004).

certain niche markets. Requiring carriers to use specific terminology or standardized labeling in their bills could hinder these carriers' efforts to serve such markets and would dampen competition in this area. Indeed, rigid requirements could have the effect of "freezing" current rate structures in a form that produces compliance with regulations, but potentially deters future innovations in the provision of rate plans. One need only look at today's wireless market to appreciate the stakes. For example, the resounding success of national "one-rate" plans would have been impossible if the Commission had required carriers to charge separately for roaming calls. So it is with the services that will pace tomorrow's market. As carriers develop new plans and products that combine voice and data services, it is impossible to foresee which bundles will best meet evolving consumer preferences. But the range of possibilities must not be subject to artificial constraints imposed by billing regulation.

Competition, carrier differentiation, and innovation have long been the hallmarks of the CMRS industry; the Commission's billing regulations should in no way impair those objectives by dictating in an overly restrictive manner the type and presentation of information CMRS carriers present on their customers' bills. Straightforward requirements that set forth basic guidelines intended to ensure that bills are easily understood and not misleading are sufficient.

B. The First Amendment Precludes the Commission from Unduly Restricting the Manner in which Carriers' Label Specific Charges on Their Customers' Bills.

The *Second FNPRM* seeks comment on the extent to which the First Amendment provides any legal impediment to the Commission's imposing on carriers any requirements for the standardized labeling of categories of charges.[26/] For the same reasons that CTIA strongly

[26/] *Second FNPRM* at ¶ 45.

opposed the relief sought in the NASUCA Petition,[27/] CTIA reiterates here that there is a substantial risk that such requirements would be inconsistent with the First Amendment and that the Commission must be especially careful about imposing rules that — even inadvertently — censor carriers' truthful, non-misleading speech.

The Commission correctly concluded in its original *Truth-in-Billing Order* and in the *Second FNPRM* that its ability to mandate or limit the specific language that carriers utilize in their descriptions of particular charges on customer bills is constrained by the First Amendment.[28/] As a result, in the *Truth-in-Billing Order,* the Commission did not impose requirements for specific language. It should reach the same resolution here, limiting its rules to those that are necessary to ensure that carrier bills are not *misleading*.

The freedom of speech protections found in the First Amendment operate as a bar to federal government limitations on legitimate commercial expressions. As the relevant caselaw makes clear, so long as speech is not "deceptive"[29/] or otherwise misleading, it cannot be banned. But a Commission rule dictating standardized labeling of categories of charges would essentially

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27/ *See* Opposition of CTIA — The Wireless Association™, *National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Monthly Line Items and Surcharges Imposed by Telecommunications Carriers; Truth-in-Billing and Billing Format*, filed in CG Docket No. 04-208, CC Docket No. 98-170, July 14, 2004, at 17.

28/ *See* First Report and Order and Further Notice of Proposed Rulemaking, *Truth-in-Billing and Billing Format*, 14 FCC Rcd 7492, 7530-31 ¶ 60 (1999) ("*Truth-in-Billing Order*") ("We emphasize that we have not mandated or limited specific language that carriers utilize to describe the nature and purpose of [line item] charges; each carrier may develop its own language to describe these charges in detail"); *Second FNPRM* ¶ 45 ("[B]oth as a matter of First Amendment law and as a matter of policy, our focus . . . is to ensure that bills are not misleading, such that consumers can make informed decisions on carriers based on pricing and services, in furtherance of the pro-competitive goals of the 1996 Act.") (citations omitted).

29/ *See* Notice of Proposed Rulemaking, *Truth-in-Billing and Billing Format*, 13 FCC Rcd 18176, 18183 ¶ 15 (1998) (citing *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 772 n. 24 (1976)).

ban all non-conforming "line item" speech in carrier bills, without any demonstration that such non-conforming language would be misleading. Such a rule accordingly would face rigorous judicial review under the First Amendment. And for the Commission to prevail, it would have to demonstrate affirmatively in each case that the non-conforming labeling is misleading or deceptive.

The Supreme Court has "not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity."[30/] When a lawmaker seeks to prohibit the dissemination of truthful, non-misleading commercial messages such as a carrier's choice of wording to identify its own charges, the prohibition should be subject to the rigorous review that the First Amendment generally demands.[31/] Under the relevant test:

> When a state regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review. However, when a state entirely prohibits the dissemination of truthful, non-misleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands.[32/]

A rule prohibiting carriers from using their own chosen wording to label their charges would thus face significant First Amendment obstacles, and would inevitably engender case-by-case constitutional challenges concerning the application of the relevant legal standard to specific

30/ *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 500 (1996) (quoting *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 n.9 (1980)).

31/ *Id.* at 501.

32/ *Id.*

language — litigation that would serve the interests of neither consumers nor carriers (nor the Commission).

For all of these reasons, carriers are in the best position to determine on a flexible, ongoing basis the optimal terminology and billing format to ensure that their billing statements are clear and not misleading and provide a plain-language description of the services being rendered. Indeed, standardized labeling of categories could unconstitutionally interfere with non-misleading labels designed to benefit specific groups of customers (*e.g.*, Spanish speakers) or introduce new categories of service (*e.g.*, bundled voice and data offerings). It makes far more sense to leave carriers in a highly competitive market free to respond to the articulated preferences of their subscribers (as evinced, for example, by customer service calls or consumer focus groups) than to compel compliance with rigid rules that may not keep up with the market or address concerns of a particular consumer group or a particular service. As noted above, carriers have every incentive to respond flexibly and quickly to such concerns. When customers are not adequately informed about the nature of specific charges on their bills, they are most likely to be surprised, and ultimately disgruntled, and this leads to churn — the central business challenge wireless carriers face.

III. THE COMMISSION SHOULD REFRAIN FROM IMPOSING SPECIFIC REQUIREMENTS ON CARRIERS WITH RESPECT TO THE COMBINATION OF MULTIPLE FEDERAL REGULATORY CHARGES INTO A SINGLE LINE ITEM.

The Commission asked in the *Second FNPRM* whether it is unreasonable under section 201(b) of the Act, 47 U.S.C. § 201, for carriers to include line items on their bills that combine more than one federal regulatory charge into a single charge.[33/] Section 201(b) creates no such

[33/] *Second FNPRM* ¶ 48.

presumption against combining charges. CTIA strongly opposes the adoption of any regulations that would dictate the manner in which carriers may present federal regulatory charges on their customer billing statements, except insofar as may be necessary to ensure that such statements are clear and not misleading.

In presenting federal regulatory charges on their customer billing statements, carriers are providing valuable information to their customers concerning the origin of certain costs that are reflected in their various calling plans. But there are multiple ways in which this information may be presented, and the Commission should leave the market free to strike the proper balance between combined and separated charges that best allows consumers to compare services between carriers.

As noted above, carriers are much better situated than the Commission to design their billing formats and to describe specific charges — including federal regulatory charges — in a way that is clear and understandable to consumers, responding to real-world customer confusion or questions on a timely basis. Any rules that control the manner in which carriers present specific regulatory charges would limit the ability of carriers to provide current and prospective customers with valuable information that would enable them to compare carriers' service offerings and calling plans. Such rules would also infringe on carriers' First Amendment interest, described in greater detail above, in providing non-deceptive information to its customers.

A "one-size-fits-all" approach to the presentation of federal line item charges is unjustified. There are often significant differences in CMRS carriers' billing systems and in the customers they serve that would make such an approach to customer billing statements cumbersome and costly, without materially advancing the public interest. In addition, to the extent that customers express a strong preference for the manner in which carriers break out federal line items, the market will reward those carriers that respond to those preferences. There is simply no reason for the Commission to anticipate that there is a need for a detailed regulatory regime absent a clear showing that there is a problem in the first place.

Indeed, regulating the manner in which charges are combined on a billing statement represents regulation of carriers' rate structures. As the Commission has recognized time and again, most recently in the *Declaratory Ruling*, rules of this sort are the equivalent of rate regulation.[34/] But wireless rates are not subject to rate regulation,[35/] and the Commission has not indicated any desire to reenter the business of wireless rate regulation. Nor should it, given the existence of a robustly competitive CMRS market.

In short, there is no problem that needs to be addressed with a regulatory solution. Regulating here would impose needless costs on the provision of service and open the door to rate regulation of CMRS providers. The Commission should decline to adopt rules on this issue.

IV. CTIA AGREES WITH THE COMMISSION THAT ANY RULES IT ADOPTS MUST BE NATIONAL IN SCOPE AND THAT STATE TRUTH-IN-BILLING REGULATIONS MUST BE PREEMPTED.

The *Second FNPRM* seeks comment on whether the Commission should preempt "state regulation of CMRS carriers' billing practices, beyond the 'line item' regulations that we recognize in the *Declaratory Ruling*."[36/] If consumers are to continue to reap the benefits of the competitive wireless market, it is imperative that the Commission adopt a federal framework that

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34/ *Declaratory Ruling* ¶ 30 ("The Commission also has made clear that the proscription of state rate regulation extends to regulation of 'rate levels' and 'rate structures' for CMRS.").

35/ *See, e.g.*, *Forbearance Order* at 1480 ¶ 180 (forbearing from regulating CMRS services under 47 U.S.C. § 205).

36/ *Second FNPRM* ¶ 50.

firmly establishes federal oversight over truth-in-billing regulation and limits state involvement in independently regulating (or even enforcing) federal rules concerning carrier billing practices. The Commission recognized as much in the *Declaratory Ruling*, in which it noted that "[t]he pro-competitive, deregulatory framework for CMRS prescribed by Congress and implemented by the Commission has enabled wireless competition to flourish, with substantial benefits to consumers."[37/] And that flourishing competition has produced a national wireless marketplace.

Wireless carriers "typically operate without regard to state borders and, in contrast to wireline carriers, generally have come to structure their offerings on a national or regional basis."[38/] State-by-state regulation of any aspect of this national service, including billing, "would be inconsistent with the federal policy of a uniform, national and deregulatory framework for CMRS" and could harm consumers.[39/] As the Commission itself has observed, "there is the significant possibility that state regulation would lead to a patchwork of inconsistent rules requiring or precluding different types of line items, which would undermine the benefits derived from allowing CMRS carriers the flexibility to design national or regional rate plans."[40/] CTIA accordingly urges the Commission to follow its tentative conclusion in the *Second FNPRM* and definitively hold that the line between federal and state authority over billing regulation "is properly drawn to where states only may enforce their own *generally applicable*

37/ *Declaratory Ruling* ¶ 35.

38/ *Id.*; *accord* Amicus Curiae Brief of the Federal Communications Commission, *Cellco Partnership d/b/a Verizon Wireless v. Hatch*, at 11 (8th Cir. filed, Nov. 12, 2004) (No. 04-3198).

39/ *Declaratory Ruling* ¶ 35.

40/ *Id.*

contractual and consumer protection laws"[41/] so long as that enforcement does not interfere with federal policies.

A. National Billing Regulations Are in the Public Interest.

The *Second FNPRM* correctly concludes that "limiting state regulation of CMRS and other interstate carriers' billing practices, in favor of a uniform, nationwide, federal regime, will eliminate the inconsistent state regulation that is spreading across the country, making nationwide service more expensive for carriers to provide and raising the cost of service to consumers."[42/] As just noted, the CMRS market is increasingly national in its scope.[43/] Truth-in-billing regulations should follow the national model that competition and the marketplace have determined to be the most beneficial and efficient way to deliver superior services to wireless customers.

1. A national framework should govern the rules for wireless services.

Wireless services are provided on a national basis for the simple reason that consumers demand it. A mobile phone purchased in one state might very well be used on a business trip in a second and a family vacation in a third. Mobile phones let truck drivers, for example, check in with family no matter where the job takes them. They let families select calling plans that keep their children in touch from all over the country after leaving home for school, work, or military service. Subscribers take their phones with them when they move, even across the country. And subscribers also increasingly use their phones for "all distance" calling, and thus seek service

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41/ *Second FNPRM* ¶ 53 (emphasis added).

42/ *Id.* ¶ 52.

43/ Ninth Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, 19 FCC Rcd 20597, 20631-32 ¶ 64 (2004) ("*Ninth CMRS Report*").

plans that provide unified billing from anywhere, to anywhere. Providers have responded to this increasingly mobile, regional, national, and even international usage of mobile service by seeking to provide service on a wider scale, thereby eliminating roaming and termination charges,[44/] which benefits consumers by providing them with simplified service at lower rates.

Because carriers offer service that can be used nationally (or at least regionally) for inter- and intrastate services, carrier rate plans have become national, covering services across multiple jurisdictions. So have carrier bills, which necessarily cover charges for services in multiple jurisdictions. And such bills typically are reviewed by consumers across the country — consumers that may no longer be in the state where they purchased their phone or originally subscribed to their service. Carriers increasingly offer a unified, single bill to a group of customers or to a family with multiple phones, even if the individual users are spread across multiple jurisdictions. Wireless rate plans and bills thus are inherently national in scope, just like the underlying service. Accordingly, national rules should apply to wireless bills, just as wireless services are best regulated, in almost all (if not all) instances, on a national basis — as Congress and the Commission recognized from the start.[45/] National rules will provide certainty and uniformity to wireless bills, thus enhancing (and preserving) the efficiencies that are one of the chief benefits of the wireless marketplace.

44/ *Ninth CMRS Report* at 20632 ¶ 64 ("Also, as the Commission has previously concluded, operators with larger footprints can achieve certain economies of scale and increased efficiencies compared to operators with smaller footprints.").

45/ 47 U.S.C. § 301; Report and Order, *An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems*, 86 F.C.C.2d 469, 503-05 ¶¶ 79-83 (1981) ("*Cellular Communications Systems*"); *Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 279 (1933) ("No state lines divide the radio waves, and national regulation is not only appropriate but essential to the efficient use of radio facilities.").

This is so for several reasons. First, of course, it is easier to follow one national rule than the requirements of fifty individual states. National rules therefore make it easier for a national carrier to centralize billing for the entire country and send unified bills to customers nationwide. Doing so reduces carrier costs, improves efficiency, and frees investment resources for more productive uses, such as developing new and innovative services and applications. In this manner, national rules would facilitate the introduction of new offerings while ensuring timely delivery of existing services. National rules would also help eliminate confusion regarding consumer rights and remedies with respect to wireless carriers by providing all parties with a clear standard that applies from state to state.

National rules also would help the Commission preserve the robust competition that has enabled the wireless market to avoid needing pervasive regulation.[46/] There is no question that wireless is one of the most competitive communications services; the Commission has repeatedly recognized the wireless market as the paragon of robust, free market competition. Last year, the Commission reaffirmed that "[b]y a number of performance indicators, U.S. consumers continue to benefit greatly from robust competition in the CMRS marketplace."[47/] The resulting benefits include "increased service availability, intense price competition, innovation, and a wider variety of service offerings."[48/] This robust competition provides more pressure on carriers to meet

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46/ Declaratory Ruling and Notice of Proposed Rulemaking, *Calling Party Pays Service Offering in the Commercial Mobile Radio Services*, 14 FCC Rcd 10861, 10889 ¶ 53 (1999).

47/ *Ninth CMRS Report* at 20688 ¶ 222.

48/ *Id.* at 20608 ¶ 20. Ninety-seven percent of the nation's population live in counties with a choice of three or more different mobile service operators, up from 88 percent in 2000. *Id.* at 20600 ¶ 2. Eighty-eight percent, almost 250 million, have a choice of five providers. *Id.* at 20609 ¶ 21. As the Commission has recognized, this competition has driven down costs for consumers. *Id.* at 20610 ¶ 26 (noting continued declines in the cellular Consumer Price Index consumer needs than any regulator ever could. Carriers face average *monthly* churn rates of 1.5 to 3.5 percent,[49/] and since LNP rules were adopted, more than 10 million wireless numbers were ported.[50/] Facing these numbers, carriers simply cannot afford to be unresponsive to consumer needs, be they for a clear signal or a clear billing statement. In other words, the market, not regulation, is perpetually driving the industry to better satisfy the needs of its customers.[51/]

Today's competitive wireless market is not a historical accident, but rather the product of sound federal policies, most notably Congress's decision (implemented by the Commission) to foreclose local regulation of rates and entry in favor of exclusive Commission authority.[52/] This step, combined with federal primacy over wireless licensing and RF issues,[53/] moved most aspects of wireless service into the exclusive regulatory ambit of the Commission and harmonized regulation in a manner that benefited consumers.[54/] And the Commission has taken

("CPI")); *id.* at 20665 ¶ 168 ("As documented in previous reports, there is ample evidence of a sharp decline in mobile telephone prices in the period since the launch of PCS service.").

49/ *Id.* at 20662-63 ¶ 161.

50/ "Trends in Telephone Service," FCC Wireline Competition Bureau Report, Table 8.8 (rel. June 21, 2005), *available at* http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/trend605.pdf.

51/ Indeed, the Commission found that "[c]onsumers continue to contribute to pressures for carriers to compete on price and other terms and conditions of service by freely switching providers in response to differences in the cost and quality of service." *Ninth CMRS Report* at 20601 ¶ 4.

52/ 47 U.S.C. § 332(c)(3).

53/ *See* 47 U.S.C. §§ 301, 302.

54/ *See* Thomas W. Hazlett, *Is Federal Preemption Efficient in Cellular Phone Regulation?* 56 Fed. Comm. L.J. 155, 223-24 (2003) ("The federal preemption of state cellular rate regulation shows that decentralized political decision making did not add value for customers. Today's market, which has generated great increases in efficiency by developing six competing national a decidedly *unregulatory* approach to that oversight, leaving the marketplace generally free to operate unfettered by unnatural constraints.[55]

Just as the Commission generally has applied a light touch to regulating wireless services, it should take the same approach with respect to the regulation of wireless billing practices. But the Commission cannot ensure that its finely calibrated approach will have any efficacy at all if wireless billing practices are simultaneously subject to the billing rules of 50 different jurisdictions. To the contrary, carriers everywhere will, as we describe below, adhere to the most cumbersome requirements of the most regulatory state in a "race to the regulatory bottom," decimating any balance the Commission might have hoped to achieve. As a result, competition will be dampened and consumers will suffer as all carriers begin to offer exceedingly similar bills and rate plans.

Finally, national rules also are necessary to preserve the other half of the balance that the Commission should try to achieve through finely calibrated truth-in-billing rules: protection of consumers. Because wireless service is provided on a national basis, only a clear set of national rules, which apply no matter where a consumer resides or uses wireless service, can ensure that all consumers have the same basic rights. National rules will likewise promote efforts by the Commission, state regulators, and consumer advocates to ensure that all consumers have access to necessary information about their service and are educated about their rights.

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networks, owes much to regulatory harmonization, suggesting that the results of a reverse experiment today would likewise underscore the deleterious effects of balkanization.").

55/ *See, e.g.*, *Forbearance Order* at 1479 ¶ 177 (forbearing from applying multiple provisions of the Act to CMRS providers).

2. State rules are incompatible with the national scope of wireless service.

To begin with, state-by-state regulation of wireless service billing presents numerous problems as a practical matter. It is not even clear which state's rules should apply to a subscriber's bills. Simply because a subscriber lists a certain state as the address to which his or her bill should be sent does not mean there is any nexus between the subscriber's mobile service and that state. As noted above, the service provider billing the subscriber typically provides service on a national scale, and the service purchased by the subscriber is national in scope. Indeed, a subscriber's wireless service may have been used primarily, or even exclusively, outside his or her state of residence. Moreover, given the increasing use of Internet-billing, the subscriber may no longer physically "receive" bills in his or her state of residence. Because of the national scope of wireless service, and because billing is so frequently electronic, a subscriber could relocate to another state, never use the phone in the original state of residence, continue to receive bills over the Internet, and never inform the carrier of the change.

Similarly, unified billing that covers multiple phones may include charges for subscribers who are located in different states — like family members or employees of a firm who share a single plan — and those subscribers may ultimately be reviewing the bill as well, in those different states. Under these circumstances, would the only applicable rules be those of the state listed on the bill? It is unclear why that state has a greater interest in the bills being clear and non-misleading than the other states in which the subscribers reside. These practical questions just underscore the fundamentally mobile, national scope of wireless service. Having one set of generally applicable federal rules simply makes more sense.

State-by-state regulation of wireless billing would frustrate any balance between regulation and competition struck by the Commission's truth-in-billing rules. Carriers with national plans will have to craft billing statements to satisfy the most "regulatory" state, producing a regulatory "race to the bottom." In other words, the state with the most burdensome rules will effectively set national policy, regardless of the balance of interests struck by the Commission's truth-in-billing rules. In this manner, just as the Commission initially recognized with respect to technical standards for wireless services, state requirements "*adding to* or conflicting with [federal standards] could frustrate federal policy."[56]

Piling on regulations in this manner serves no public interest. Forcing carriers to satisfy rules set by multiple regulators rather than the market may have the perverse effect of *reducing* the useful billing information available to consumers. Consider disclosure rules. If different states have different rules concerning which disclosures must be prominent, carriers may be forced to highlight multiple disclosures to ensure that all local rules are satisfied. But if all terms are "prominently" disclosed, then none of them are. The resulting "information overload" would harm consumers by making the disclosures that the *market* deems most important less prominent.

In addition to producing limited benefits, excessive regulation needlessly raises costs for consumers and carriers alike. Allowing a patchwork of local truth-in-billing regulations would endanger the marketing efficiencies produced by national plans. Local billing rules will necessarily vary state-by-state, increasing compliance costs for cross-border carriers who are forced to grapple with the complexity of complying with multiple rules in a single bill. Instead of the reduced costs made possible by integrating billing operations, carriers would face the expense of customizing their materials to conform to variations in local rules. These costs will only be exacerbated as different states develop different regulatory models. Some regulations might be overly rigid; others, overly vague. Accommodating both ends of the spectrum while

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56/ *Cellular Communications Systems* at 505 ¶ 82 (emphasis added).

violating no states' rules in a single bill will prove challenging — not to mention costly. The alternative is for carriers to *raise* their — and consumers — costs by tailoring a different billing mechanism for each individual jurisdiction.

More generally, state-by-state regulation will frustrate Commission goals by threatening the robust competition that exists in today's wireless market and the continuing introduction of innovative new products and services. If wireless carriers are deprived of the benefits of the efficiencies of operating on a national or regional basis, low-margin carriers may be forced to exit these markets altogether. Customers of the remaining carriers will be harmed in at least two respects. First, they will have fewer providers to choose from. Second, they will have fewer new services available to them. The increased costs of providing service will reduce the resources available for bringing new products and other innovations to market. Indeed, excessive state regulation will deter carriers from offering subscribers new and efficient subscription and billing mechanisms (*e.g.*, over the Internet) and stifle the experimentation that would otherwise enhance and expand the national wireless market.[57/] Even leaving aside the costs of regulatory compliance, ensuring that every new offering complies with every state regulation cannot help but slow the rollout of new services.

Nor would bypassing particularly "regulatory" states solve the problem. The effects on innovation caused by any one state's regulatory policy radiate beyond its borders. When a local regulation deters the introduction of a new service in one state, the costs of bringing the service

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57/ National rate plans themselves are an example of a once-novel innovation that spread throughout the market to benefit consumers. *See Ninth CMRS Report* at 20644 ¶ 113 ("AT&T Wireless's Digital One Rate plan, introduced in May 1998, is one notable example of an independent pricing action that altered the market and benefited consumers. Today all of the nationwide operators offer some version of a national rate pricing plan in which customers can purchase a bucket of MOUs to use on a nationwide or nearly nationwide network without incurring roaming or long distance charges.") (footnote omitted).

to market nationally necessarily rise because of the narrowed base of potential customers. As a result, consumers in *all* markets may have to wait longer for innovative new services. This is an especially important consideration at a time when both wireless data (information) and wireless video services promise consumers exciting new capabilities.[58/] As these nascent markets develop, it is important that consumers, not regulators, choose the winners and losers.[59/] The Commission should take action to ensure that its rules preserve the marketplace incentives to develop similar innovations in the future.

Uniform national regulation also reduces a major source of litigation costs, which benefit neither carriers nor their customers. One set of truth-in-billing regulations interpreted and applied by the Commission necessarily will provide greater certainty across the industry than would the "varying and possibly conflicting determinations" regarding billing practices that would result from distinct regulations in 50 different states.[60/] Preemptive national rules will also lessen the current ambiguity regarding the jurisdictional lines between state and federal

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[58/] *See, e.g.*, Chris Marlow, The Hollywood Reporter, Apr. 4, 2005 (Verizon Wireless currently offers video content from VH1 and Comedy Central; Nickelodeon and CMT are expected to launch such content in May 2005); *id.* (mobile entertainment company Msport is planning to roll out video programming mobile services in the coming months); Gary Gentile, "Verizon CEO Seeks Content for TV Service at Broadcasters' Show", Associated Press, Apr. 19, 2005 (Hewlett-Packard recently announced that "it has teamed with Infinity Broadcasting to bring video content to FM radio broadcasts sent to mobile phones"); "Sprint TV-SM Adds Live Television from FOX News Channel-R", Business Wire, Apr. 19, 2005 (Sprint currently offers seventeen channels of video content, including FOX News Channel content, on demand over its PCS service).

[59/] In this manner, a uniform national policy implements Congress's deregulatory policies as embodied in sections 230 and 706 of the Act.

[60/] *Cf.* Declaratory Ruling, *Exclusive Jurisdiction With Respect to Potential Violations of the Lowest Unit Charge Requirements of Section 315(b) of the Communications Act of 1934 As Amended*, 6 FCC Rcd 7511, 7512 ¶ 12 (1991) ("*Lowest Unit Charge Order*"), *on recon.*, 7 FCC Rcd 4123 (1992), *pet. for review dismissed sub nom.*, *Miller v. FCC*, 66 F.3d 1140 (11th Cir. 1995).

authority. Many controversies involving wireless services become bogged down in jurisdictional disputes and questions of which state regulations constitute preempted rate or entry regulation, and which are "other terms and conditions" under section 332 of the Act.[61/] Absent Commission

[61/] *Compare, e.g.*, *Bastien v. AT&T Wireless Servs., Inc.*, 205 F.3d 983, 990 (7th Cir. 2000) (finding that breach of contract and consumer fraud claims arising out of defendant's signing up subscribers without first building the cellular towers and other infrastructure necessary to accommodate good cellular communications, "although fashioned in terms of state law actions, actually challenge[] the rates and level of service offered by AT&T Wireless, an area specifically reserved to federal regulation"); *Franczyk v. Cingular Wireless, LLC.*, No. 03 C 6473, 2004 WL 178395, at *3 (N.D. Ill. Jan. 21, 2004) (finding allegations of fraud, breach of contract and unjust enrichment because of a fictitious fee in a phone bill to be "a rate challenge" within the jurisdiction of the federal courts); *Alport v. Sprint Corp.*, No. 03 C 6246, 2003 WL 22872134, at *4 (N.D. Ill. Dec. 4, 2003) ("Given *Bastien*'s mandate that the FCA preempts a wide variety of state law challenges to wireless service billing practices, we find Alport's complaint concerning the propriety of the Federal E911 surcharge to be a rate challenge that fits squarely within the scope of federal jurisdiction."); *Aubrey v. Ameritech Mobile Communications, Inc*., No. 00-75080, 2002 WL 32521813, at *1 (E.D. Mich. June 17, 2002) (plaintiff's allegations relating to the comparatively poor quality of service which he received and the rates that he was charged for these services, "fall squarely within the preemptive scope of section 332"); *Gilmore v. Southwestern Bell Mobile Sys., Inc*., 156 F. Supp. 2d 916, 924 (N.D. Ill. 2001) (finding that state law claim that customer was charged fee in violation of contract was preempted challenge to rates); *In re Comcast Cellular Telecomms. Litig*., 949 F. Supp. 1193 (E.D. Pa. 1996) (claims of deceptive and undisclosed billing practices arising from the defendant's alleged practice of charging for noncommunication time and rounding up minutes were challenges to the defendants' "rates" and as such were preempted under the language of § 332); *Ball v. GTE Mobilnet of Cal.*, 81 Cal App. 4th 529, 537-38 (2000) (claims attacking the reasonableness of the method by which the defendants calculate the length and, consequently, the cost of a cellular phone call presented "a direct challenge to the rates charged by the defendants for cellular phone service" and so were preempted by § 332), *with Pinney v. Nokia, Inc.*, 402 F.3d 430 (4th Cir. 2005) (claim that would require headsets for wireless telephones would not constitute a barrier to entry into the PCS market); *Fedor v. Cingular Wireless Corp.*, 355 F.3d 1069, 1074 (7th Cir. 2004) (claims alleging breach of contract when wireless telecommunications provider inappropriately attributed calls made in one billing period to a different billing period do not "require the state court to assess the reasonableness of the rates charged or impact market entry," so therefore the claims were not preempted under § 332); *Cellular Telecomms. Indus. Ass'n v. FCC*, 168 F.3d 1332 (D.C. Cir. 1999) (Texas law requiring telecommunications services providers in state to contribute to state-run universal service programs was permissible state regulation of "other terms and conditions" under § 332); *In re Wireless Telephone Fed. Cost Recovery Fees Litig*., 343 F. Supp. 2d 838 (W.D. Mo. 2004) (claims that providers misrepresented nature of charges they were passing through as result of federally mandated activities were not attacks on the providers' "rates" and so were not preempted under § 332);

action, the existing uncertainty will be exacerbated as states consider additional local regulation of billing practices.[62/] National rules that make clear that billing regulation is a federal matter will bring needed clarity to the jurisdictional issue afflicting the courts and lower litigation costs for wireless carriers, and thus their customers.

3. Intrusive local regulation burdens interstate commerce.

Individual state regulation of the terms of national services creates potential conflicts with the dormant Commerce Clause. First, as the Commission has explained, "a state law that 'has the "practical effect" of regulating commerce occurring wholly outside that [s]tate's borders' is a violation of the Commerce Clause."[63/] In its *Vonage Order*, the Commission found that applying traditional state telephone regulation to new VoIP services would likely have the "practical effect" of regulating commerce outside of its borders because a VoIP user's location

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Cellco P'ship v. Hatch, Civ. 04-2981(JRT/SRN), 2004 WL 2065807, at *4 (D. Minn. Sept. 3, 2004) (finding Minnesota law that requires wireless providers to disclose rates, to obtain consent to rate increases, and to honor contractual obligations "is not rate regulation, as that term has been defined by the FCC and the courts"); *Phillips v. AT&T Wireless*, No. 4:04-CV-40240, 2004 WL 1737385 (S.D. Iowa July 29, 2004) (early termination fees constitute "other terms and conditions" and are not preempted by § 332); *Brown v. Washington/Baltimore Cellular, Inc.*, 109 F. Supp. 2d 421 (D. Md. 2000) ("rates" under § 332 do not include late fee charges assessed on wireless telephone subscribers' cellular phone accounts); *DeCastro v. AWACS, Inc.*, 935 F. Supp. 541 (D.N.J. 1996) (claims of deceptive and undisclosed billing practices arising from the defendant's alleged practice of charging for noncommunication time and rounding up minutes "challeng[ed] the fairness of a billing practice, not the rates themselves" and so claims were not preempted under § 332); *see generally* Leonard J. Kennedy & Heather A. Purcell, *Wandering Along the Road to Competition and Convergence—The Changing CMRS Roadmap*, 56 Fed. Comm. L.J. 489, 505-11 (2004) (collecting cases).

[62/] *See, e.g.*, General Order No. 168, Public Utilities Comm'n of the State of California, *Rules Governing Telecommunications Consumer Protection*, Decision 04-05-057, Rulemaking 00-02-004 (Cal. P.S.C. May 27, 2004) ("*Cal. P.S.C. General Order*"), *modified by* Decision 04-10-013, Oct. 7, 2004.

[63/] Memorandum Opinion and Order, *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minn. Pub. Utils. Comm'n*, 19 FCC Rcd 22404, 22428 ¶ 38 (2004) ("*Vonage Holdings Corp.*") (quoting *Healy v. Beer Institute*, 491 U.S. 324, 332 (1989)).

cannot not be practically determined.[64] As a result, an individual state's regulation of the service threatened to set policy for the nation.

> While states can and should serve as laboratories for different regulatory approaches, we have here a very different situation because of the nature of the service - our federal system does not allow the strictest regulatory predilections of a single state to crowd out the policies of all others for a service that unavoidably reaches all of them.[65]

Just so here. Users of mobile services have the same mobility as do users of the VoIP technology at issue in *Vonage*. State regulation of wireless services, like that of VoIP services, would have the practical effect of regulating interstate commerce.

Second, requiring wireless carriers to satisfy billing regulations of 50 differing jurisdictions will stifle the rollout of new services, as explained in detail above. Like the Minnesota regulation of VoIP at issue in *Vonage*, such regulations would be "clearly excessive in relation to the putative local benefits," and would place an undue burden on interstate commerce.[66]

B. State Regulation of Line Items in CMRS Bills Should Not Extend beyond Generally Applicable Contract and Consumer Protection Law, and State Commissions Should Not Administer Federal Regulations.

The proper division of authority between state and federal regulators should not endanger the Commission's policy of uniform national regulations, and it should ensure that, absent conflict with federal policies, states are able to protect their citizens against deceptive or fraudulent practices. The best way to implement these goals is for the Commission to implement

[64] *Id.* at 22428 ¶ 39.

[65] *Id.*

[66] *Id.* at 22429 ¶ 40.

the *Second FNPRM*'s tentative conclusion that state regulation of wireless billing practices is properly confined to the enforcement of "generally applicable contractual and consumer protection laws."[67/]

1. The Commission should eliminate 47 C.F.R. § 64.2400(c) from its rules as applied to CMRS carriers.

CTIA urges the Commission to eliminate 47 C.F.R. § 64.2400(c) from its rules, at least with respect to CMRS carriers. All telecommunications service issues are properly within the Commission's exclusive authority. Issues of traditional state concern (like contract formation, fraud, unfair business practices) would not, however, be categorically preempted.[68/] This division protects the federal interest in uniform rules, described above, while preserving the ability of the states to protect consumers from fraudulent misrepresentations.[69/] This approach is also consistent with prior Commission precedent.[70/]

47 C.F.R. § 64.2400(c) cannot accommodate the need for a national policy. The regulation specifically excludes from preemption purportedly "consistent" state truth-in-billing

67/ *Second FNPRM* ¶ 53.

68/ The *Second FNPRM* seeks comment on whether "cramming" regulations fall under Commission or state jurisdiction. *Id.* ¶ 54. Under the framework discussed above, state "cramming" regulations that dictate the presentation of charges on a phone bill would interfere with the Commission's authority. States may, however, police fraudulent behavior leading to cramming using laws of general applicability.

69/ Of course even state rules of general applicability as well as state court proceedings could interfere with the Commission's rules and would be subject to the normal application of conflict preemption principles under the Supremacy Clause. *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000).

70/ *See Declaratory Ruling* ¶ 30 (preempting state regulation of line items); Memorandum Opinion and Order, *Southwestern Bell Mobile Systems, Inc., Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Challenges to, Rates Charged by CMRS Providers When Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments*, 14 FCC Rcd 19898, 19906-07 ¶ 20 (1999).

regulations.[71] Allowing overlapping regulation creates the same danger of an inconsistent patchwork of state regulations that national rules are designed to prevent. First, whether state regulations are or are not "consistent" with Commission rules is itself an issue that threatens to create a myriad of long and costly legal disputes that will destroy the certainty necessary to promote the deployment of wireless services. Second, different states' regulations that are "consistent" with federal regulations may be entirely inconsistent with each other, especially with 51 state commissions potentially imposing different wireless billing regulations. Third, even though states may adopt regulations that are consistent in their wording with Commission standards, they may well enforce those regulations in a manner entirely at odds with Commission policies — and with those of other states. In interpretation and application, the regulations may take on a very different substantive meaning than the federal regulations they were meant to complement.

Moreover, there is simply no need for independent state truth-in-billing rules, be they parallel to the Commission's rules or not. As discussed above, robust competition in the wireless market imposes strict market discipline upon carriers to ensure that they provide the services and disclosures needed by consumers. In addition, myriad state consumer protection and contract laws of general applicability target fraudulent or deceptive behavior that might distort the market. These rules already work to ensure fair business practices by all industries operating within state borders. To the extent that industry-specific regulations are needed beyond rules of general applicability, the Commission already provides them in the form of its national truth-in-billing rules. The incremental benefits of yet another layer of regulation are too small to justify the extensive costs of permitting state-by-state regulation. The far better approach is for the

[71] 47 C.F.R. § 64.2400(c).

Commission to finish what it started in the *Declaratory Ruling* and eliminate the ability of the states to impose truth-in-billing rules. Doing so will not cut states out of billing policy. States will retain an important role in the enforcement of Commission regulations by bringing complaints under 47 U.S.C. § 208, which is both explicitly authorized by statute[72/] and precedent.[73/]

2. States should not be the enforcers of a federal regime.

The Commission also seeks comment on whether states should have a role in enforcing Commission regulations. As an example, the Commission asks if its slamming regulations, which permit states to adjudicate slamming disputes, are an effective model for truth-in-billing rules.[74/] They are not. State commissions should not enforce federal billing rules. Allowing them to do so will give rise to the same issues that necessitate uniform national rules in the first instance, as well as violate the Communications Act.

The slamming enforcement regime is not a good model for truth-in-billing regulation. Under the Commission's slamming rules, states may enforce the Commission's unauthorized carrier change rules and remedies.[75/] Slamming disputes concern the inherently *factual* question

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72/ 47 U.S.C. § 208 (permitting "any body politic" or "State commission" to petition the Commission to review complaints against common carriers).

73/ *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 566 (D.C. Cir.) ("*USTA II*") (recognizing that outside input into agency decisions is appropriate when input involves fact gathering or advice giving), *cert. denied sub nom.*, *National Ass'n of Regulatory Comm'rs v. United States Telecom Ass'n*, 125 S. Ct. 313 (2004).

74/ *Second FNPRM* ¶ 57.

75/ 47 C.F.R. § 64.1110.

of whether a consumer agreed to receive phone service from a particular carrier.[76/] State administration of the slamming regime to determine whether slamming has occurred does not, therefore, risk interference with federal policies designed to prevent slamming.

Giving states such authority vis-à-vis truth-in-billing rules is far more problematic. Existing truth-in-billing rules are non-prescriptive standards that afford carriers the leeway necessary to devise their own billing disclosures in response to market pressures (and any specific guidance the FCC sees fit to provide). For example, 47 C.F.R. § 64.2401(b) requires that "[c]harges contained on telephone bills must be accompanied by a brief, clear, non-misleading, plain language description of the service or services rendered."

But in the absence of rigorously prescriptive rules that the Commission has never contemplated, the question whether a bill's disclosures are proper becomes an inherently *substantive* one. Truth-in-billing enforcement issues therefore cannot be divorced from the *policy* question of what disclosures are appropriate.[77/] Permitting each state to decide for itself the meaning of the Commission's standards would effectively divest the Commission of authority over billing regulations. If each individual state could give its own interpretation of which disclosures are, for example, "clear," the Commission's standards would have different meanings from state to state. These local decisions would hamper the Commission's ability to maintain nationally uniform billing regulations. Alternatively, carriers with national plans might modify their disclosures to conform to the policies of the state with the most restrictive

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76/ First Order on Reconsideration, *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 8158, 8172-73 ¶ 29 (2000) (directing state commissions to explain "what safeguards exist to ensure procedural fairness" in adjudicating slamming complaints).

77/ The exception would be cases of outright fraud, which are adequately addressed by state consumer protection laws of general applicability.

interpretation of the Commission's rules. The effect would be the same as would letting every state impose its own truth-in-billing rules. An individual state — instead of the Commission — could set policy for the Nation.[78/]

The Commission faced a very similar problem in determining to preempt state enforcement of the federal "lowest unit charge" requirements of section 315(b) of the Act. At the same time the Commission was in the process of reforming its own rules "to provide certainty and consistency" for broadcasters, it recognized that "[r]ulings by courts in numerous jurisdictions around the country almost certainly" would frustrate that goal by "produc[ing] varying and possibly conflicting determinations among state courts and between those courts and the Commission."[79/] And the result — as here — would be "perilous" for licensees "who serve more than one jurisdiction."[80/]

Further, allowing states to give substantive, binding interpretations of the Commission's rules also raises substantial delegation problems. The Commission may not "delegat[e] to another actor almost the entire determination of whether a specific statutory requirement . . . has been satisfied."[81/] In *United States Telecom Ass'n v. FCC* ("*USTA II*"), the D.C. Circuit squarely

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78/ The same considerations apply if the Commission were to federalize the terms of the Assurance of Voluntary Compliance negotiated by certain wireless carriers with attorneys general from 32 states. *Second FNPRM* ¶ 56 (seeking comment regarding the AVC). Permitting individual state commissions to determine, for example, which disclosures are "clear and conspicuous" or "material", Letter from Kathryn A. Zachem, Counsel for Verizon Wireless, to Marlene H. Dortch, FCC, filed in Docket No. 98-170, Jan. 10, 2005 (Attachment – Assurance of Voluntary Compliance), will permit them to make substantive judgments that may be at odds with national policy as established by the Commission.

79/ *Lowest Unit Charge Order* at 7512 ¶ 12.

80/ *Id.* at 7512 ¶ 13.

81/ *USTA II*, 359 F.3d at 567.

held that the Commission cannot delegate its statutory decision-making authority to outside entities without clear congressional authorization.[82/] The court therefore struck down Commission rules that permitted state commissions to make market-by-market decisions implementing section 251(d)(2) of the Act, which directs *the Commission* to determine which network elements must be unbundled.

In holding that subdelegating the Commission's authority to outside parties is presumptively improper,[83/] the court also noted that the practice is antithetical to democratic governance. "[W]hen an agency delegates power to outside parties, lines of accountability may blur, undermining an important democratic check on government decision-making. Also, delegation to outside entities increases the risk that these parties will not share the agency's national vision and perspective."[84/]

Allowing states to determine the adequacy of disclosures under federal law raises precisely the same delegation problems struck down by the D.C. Circuit in *USTA II*. The Commission's truth-in-billing rules are enacted pursuant to its authority in section 201(b) of the Act,[85/] which permits *the Commission* to determine which practices are just and reasonable.[86/]

82/ *Id.* at 566. The court identified three types of cases in which outside input is permissible: "(1) establishing a reasonable condition for granting federal approval; (2) fact gathering; and (3) advice giving." *Id.* Permitting state regulators to determine the substantive meaning of Commission regulations fits none of these categories.

83/ *Id.* at 565.

84/ *Id.* at 565-66 (citations and quotation marks omitted).

85/ *Declaratory Ruling* ¶ 25 ("The Commission has concluded that a carrier's provision of misleading or deceptive billing information is an unjust and unreasonable practice in violation of section 201(b).").

86/ 47 U.S.C. § 201(b).

No provision of the Communications Act authorizes the Commission to place this power in the hands of the states. Quite the contrary. As the Commission has repeatedly recognized, most recently in the *Declaratory Ruling*, billing regulations encompass rate structures and therefore the ability of carriers to set rates and enter the wireless market.[87/] Congress has explicitly prohibited the states from regulating in this area.[88/] Further, if each state may give its own substantive gloss to the Commission's rules, the "lines of accountability" between the rules' promulgation and enforcement will necessarily blur.[89/] These risks are especially acute in the billing context, in which, as discussed above, enforcement decisions often embody important policy choices and often have the same substantive effect as a rulemaking.

C. The Commission Has the Authority to Adopt a Purely National Regulatory Framework and Preempt State Billing Regulations.

The Commission seeks comment on whether preemption theories other than the express preemption provisions of 47 U.S.C. § 332(c)(3) allow it to preempt state billing regulations.[90/]

87/ *Declaratory Ruling* ¶ 30.

88/ 47 U.S.C. § 332(c)(3). Moreover, the Act specifically requires those claiming damages by any common carrier subject to the Act to pursue his or her remedies in either federal district court or the Commission *not* with state commissions. 47 U.S.C. § 207.

89/ *USTA II*, 359 F.3d at 565.

Legal impediments aside, the record in the Truth-in-Billing docket simply does not support the adoption of specific penalty amounts and procedures for point of sale disclosure violations akin to the slamming rules. The record in this proceeding makes clear that the vast majority of consumer complaints with respect to the disclosures made at the point of sale for telecommunications services have arisen in connection with wireline — not wireless services. Accordingly, the adoption of extensive enforcement rules targeting potential point of sale disclosure violations by CMRS carriers is premature. Instead, the Commission should refrain from adopting specific enforcement rules unless and until there appears to be systemic compliance issues, which is by no means the case today.

90/ *Second FNPRM* ¶ 50.

Of course, many such regulations are already preempted, with respect to CMRS providers, by the Communications Act's prohibition of state regulations of "entry" and "rates."[91/] But there is no doubt that other bases exist for the Commission to preempt state truth-in-billing regulations that seek to supplement federal rules.

1. Statutory preemption under section 332(c)(3)(A).

As an initial matter, the Commission should extend its *Declaratory Ruling* to all state efforts to regulate CMRS carrier billing practices and hold that such regulations are preempted "rate" regulations under § 332(c)(3). As discussed above, local truth-in-billing regulations place considerable pressure on carriers' ability to structure uniform national "one-rate" and similar plans. The Commission would be well within its discretion to conclude that state truth-in-billing rules must therefore be preempted as an impermissible rate or entry regulation. But other bases exist for preempting such regulations.

2. Field preemption.

The Commission should conclude that federal law has occupied the field of wireless regulation with respect to all billing-related issues. Field preemption may be inferred from a "scheme of federal regulation … so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, or where an Act of Congress touches a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[92/]

91/ 47 U.S.C. § 332(c)(3)(A).

92/ *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990) (internal quotation marks and citation omitted).

With respect to all billing-related issues, the Commission can declare that it occupies the field. Even if specific regulations are not "rate regulation" per se, they are sufficiently close that they fall within the field of rate regulation that Congress clearly has assigned to the FCC and in which the Commission has now regulated broadly under its truth-in-billing rules.[93/] And in fact, that field should be interpreted even more broadly. Wireless telephony is subject to a pervasive federal scheme beyond the rate and entry regulations referenced by section 332(c)(3) of the Act. The FCC's efforts to fulfill its national policy obligations with respect to wireless services under the Act has led to its adoption of ever more and more comprehensive regulations, concerning RF emissions,[94/] spectrum aggregation,[95/] roaming service,[96/] 911,[97/] number portability,[98/] and, in the *Second Report and Order*, billing.[99/] Over time, it has become clear that the federal policy goal of a dynamic and competitive wireless industry requires pervasive federal regulation.

3. Conflict Preemption.

In any event, any state regulations concerning billing will almost inevitably conflict with national policies for the wireless industry and should be preempted on that basis. Conflict preemption is appropriate either when compliance with both a federal and state law is a "physical impossibility" or, relatedly, "when the state law stands as an obstacle to the accomplishment and

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93/ *Cf. Southwestern Bell Wireless Inc. v. Johnson Bd. of County Comm'rs*, 199 F.3d 1185, 1193 (10th Cir. 1999) (finding federal field preemption of RF regulations).

94/ *See, e.g.*, 47 C.F.R. §§ 1.1307(b), 1.1310.

95/ *See, e.g.*, 47 C.F.R. § 20.6.

96/ *See, e.g.*, 47 C.F.R. § 20.12(c).

97/ *See, e.g.*, 47 C.F.R. § 20.18.

98/ *See, e.g.*, 47 C.F.R. § 52.31.

99/ *See, e.g.*, 47 C.F.R. § 64.2400(b).

execution of the full purposes and objectives of Congress."[100] An agency may determine to preempt without an "express congressional authorization to displace state law."[101] Instead, the agency must merely show that preemption is necessary to "'reasonab[ly] accommodat[e] . . . [the] conflicting policies that were committed to the agency's care by the statute.'"[102] The agency is afforded considerable leeway in determining when preemption is necessary, even to the point of determining "that its authority is exclusive and pre-empts any state efforts to regulate in the forbidden area."[103] Likewise, a reviewing court will not disturb the agency's preemption decision "'unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.'"[104] And the presence of a specific *express* statutory preemption provision (like section 332(c)(3)) does not confine the agency's *implicit* power to preempt under delegated authority.[105]

Preemption is appropriate here. The *Second FNPRM* correctly recognizes that "there are clearly discernable federal objectives that may be undermined by states' 'non-rate' regulation of CMRS carriers' billing practices."[106] As discussed above, wireless carriers are licensed by the

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100/ *Mount Olivet Cemetery Ass'n v. Salt Lake City,* 164 F.3d 480, 486 (10th Cir. 1998) (considering preemption of local zoning ordinance) (citing *Barnett Bank of Marion County, N.A. v. Nelson,* 517 U.S. 25, 31 (1996)). *See also Geier*, 529 U.S. at 869.

101/ *City of New York v. FCC*, 486 U.S. 57, 64 (1988) (internal quotation marks and citation omitted).

102/ *Id.* at 61 (quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961)).

103/ *Id.* at 64.

104/ *Id.* (quoting *Shimer*, 367 U.S. at 383).

105/ *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta,* 458 U.S. 141, 162 (1982).

106/ *Second FNPRM* ¶ 50.

Commission without regard to state borders, they engineer and operate their networks without regard to state borders, and customers use their wireless service without regard to state boundaries. Moreover, CMRS carriers' rate plans and service offerings are structured on a national or regional basis. Permitting states to impose their own regulations, or give binding interpretations of the Commission's rules, would inevitably lead to a "patchwork of inconsistent rules" that "would undermine the benefits derived from allowing CMRS carriers the flexibility to design national or regional rate plans."[107/] As a result, consumers will face higher prices, the rollout of new services will be delayed, and jurisdictional uncertainty will continue to plague the courts. Preemption is especially appropriate here to prevent states from regulating in those areas for which the Commission has determined regulation is unnecessary as a matter of federal policy.[108/] But states are becoming increasingly active in the field of billing regulation.[109/] The federal goal of a pro-competitive framework that allows the market, not regulators, to craft consumer communications requires the Commission to preempt conflicting state rules without delay.[110/]

107/ *Declaratory Ruling* ¶ 35.

108/ *See Geier*, 529 U.S. at 869.

109/ *See, e.g.*, *Cal. P.S.C. General Order*.

110/ It is appropriate for the Commission to act to remove jurisdictional uncertainty. "[T]he federal agency charged with administering the statute is often better able than are courts to determine the extent to which state liability rules mirror or distort federal requirements." *Bates v. Dow Agrosciences LLC*, 125 S. Ct. 1788, 1804 (2005) (Breyer, J., concurring).

4. There are no other impediments to Commission action.

The Commission asks if there are "any other potential legal impediments, such as interstate and intrastate jurisdictional issues" to its ability to implement its rules.[111/] There are none. As noted above, Congress, the Commission, and the Supreme Court have consistently recognized the inherently interstate nature of Title III services, and the proliferation of national calling plans only underscores that jurisdictional foundation today. Moreover, "[s]ubstantial judicial precedent makes clear that an agency may preempt state action under the Supremacy Clause whether or not an intention to preempt can be found in the governing statute or its legislative history."[112/] The critical question is simply whether the Commission is acting within "the proper bounds of its lawful authority to undertake such action."[113/] The Commission's truth-in-billing orders are firmly grounded in its authority under section 201(b) of the Act.[114/] No more is necessary for preemptive authority over contrary state regulation.[115/]

111/ *Second FNPRM* ¶ 45.

112/ *Lowest Unit Charge Order* at 7512 ¶ 9.

113/ *City of New York*, 486 U.S. at 64.

114/ *Declaratory Ruling* ¶ 25 ("Section 201(b) of the Act requires that all charges, practices, classifications, and regulations for and in conjunction with interstate communications service be just and reasonable, and gives the Commission jurisdiction to enact rules to implement that requirement."). Of course, section 201(b) is not the Commission's only source of authority over billing matters. *See Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking* at ¶ 69 (ordering clause invoking 47 U.S.C. §§ 151-154, 201, 202, 206-208, 258, 303(r), and 332; section 601(c) of the Telecommunications Act of 1996 as authority for the Commission's action).

115/ *See, e.g.*, *New York v. FERC*, 535 U.S. 1, 18 (2002) (agency preemption cases "do[] not involve a 'presumption against pre-emption' . . . . we must interpret the statute to determine whether Congress has given FERC the power to act as it has, and we do so without any presumption one way or the other").

Nor does the Act preclude the Commission from preempting "other terms and conditions" under 47 U.S.C. § 332(c)(3). As a textual matter, it is clear that Congress preserved state regulation of "other terms and conditions" *only* against the preemptive effect of the express preemption provision in section 332(c)(3) itself.[116] This is in stark contrast to those other provisions of the Communications Act that are expressly designed to preserve local authority from preemption by the Commission more generally.[117] In other words, Congress did not intend for section 332 to broadly preserve state law concerning "other terms and conditions" from Commission preemption. It simply provided that such laws were not *automatically* preempted under section 332, and thus would be preserved *unless and until the Commission identified a particular basis for preemption.* Indeed, the Commission reached precisely this conclusion in 1994, when it determined that — notwithstanding section 332(c)(3) — it had "authority under *Louisiana PSC* to preempt [state] regulation" of "other terms and conditions" if it found that such regulation "thwarts or impedes our federal policy[.]"[118]

The courts have likewise made clear that an agency's authority allows it to preempt state laws that are "otherwise *not* inconsistent with federal law."[119] In other words, even if a state

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[116] *See* 47 U.S.C. § 332(c)(3) ("except that *this paragraph* shall not prohibit a State from regulating the other terms and conditions of commercial mobile services") (emphasis added).

[117] *See, e.g.,* 47 U.S.C. § 227(e)(1) (with certain exceptions "nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on" unsolicited faxes, automatic dialing systems, etc.); *id.* § 532(g) (Commission regulations concerning leased access rules "shall not preempt authority expressly granted to franchising authorities under this subchapter.").

[118] *Forbearance Order* at 1506 ¶ 257 n.517. While the Commission was referring to its authority to achieve "regulatory symmetry" for "jurisdictionally mixed services," *id.* (which in fact includes all wireless services), the precise same result should follow under standard conflict preemption principles.

[119] *City of New York*, 486 U.S. at 64 (emphasis added).

regulation is an "other term" or "condition" consistent with section 332(c)(3), it nevertheless is subject to preemption by the Commission on other grounds.[120]

Section 332(c)(3)'s status as a "savings clause" for state regulation does nothing to affect the principles of conflict preemption and the Commission's authority.[121] In *Geier v. American Honda Motor Co*., the Supreme Court conclusively established that agencies retain the right to issue preemptive rules under standard conflict preemption principles notwithstanding a "savings clause" that would otherwise preserve state authority. The Court concluded in that case that a state law savings clause in the National Traffic and Motor Vehicle Safety Act precluded a finding of *express* statutory preemption of a state tort suit based on the absence of a driver's side airbag.[122] However, the *Geier* Court went on to consider whether that tort suit was nevertheless preempted on the ground that it would *conflict* with DOT policy goals underlying a federal regulation that did not require the airbag in question. The Court found that while the savings clause "removes tort actions from the scope of the express pre-emption clause," it does not "foreclose or limit the operation of ordinary pre-emption principles [that] instruct us to read statutes as pre-empting state laws . . . that 'actually conflict' with the statute or *federal standards*

120/ *See International Paper Co. v. Ouellette*, 479 U.S. 481, 493 (1987) (savings clause in section 505(e) of the Clean Water Act providing that "'[n]othing *in this section*' [of the Act] . . . shall affect an injured party's right to seek relief under state law" does not preclude agency preemption based on authority provided by its overarching authority to accomplish its duties under "other provisions of the Act.") (emphasis in original); *see also Feikema v. Texaco, Inc.*, 16 F.3d 1408, 1414 (4th Cir. 1994) ("The natural reading of the phrase, 'nothing in *this* section shall restrict' does not preclude preemption by *other* sections of the RCRA.").

121/ *See Geier*, 529 U.S. at 861.

122/ *Id.* at 868.

promulgated thereunder."[123/] Section 332(c)(3) simply does not restrict the Commission's authority.

Nor do the Act's other "savings" provisions — sections 414 or 2(b)[124/] — interpose any barriers to the Commission's preemptive authority. As the Commission has observed with respect to section 414, "[u]nder accepted principles of statutory construction . . . the savings clause cannot preserve state law causes of action or remedies that contravene express provisions of the Telecommunications Act."[125/] Both the courts and the Commission have consistently interpreted this provision to yield to the substantive terms of the Act,[126/] which include those provisions authorizing the Commission to issue its truth-in-billing regulations.

123/ *Id.* at 869 (emphasis added).

124/ 47 U.S.C. § 414 ("Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."); *id.* § 152(b) ("Except as provided in . . . section 332 of this title, and subject to the provisions of section 301 . . . nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier[.]")

125/ Memorandum Opinion and Order, *Wireless Consumers Alliance, Inc.,* 15 FCC Rcd 17021, 17040 ¶ 37 (2000).

126/ *See, e.g.*, *AT&T v. Central Office Tel. Inc.*, 524 U.S. 214, 227-28 (1998) (section 414 "cannot in reason be construed as continuing . . . a common law right . . . which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself." (alterations in original) (quoting *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907)); *Bastien v. AT&T Wireless Servs., Inc.*, 205 F.3d 983, 987 (7th Cir. 2000) ("To read [section 414] expansively would abrogate the very federal regulation of mobile telephone providers that the act intended to create."); *In re Comcast Cellular Telecomms. Litig.*, 949 F. Supp. 1193, 1205 (E.D. Pa. 1996) ("[T]the savings clause cannot plausibly be read to preserve state law claims which directly conflict with the preemption of state regulation of CMRS rates envisioned by Section 332 of the Act."); Order on Reconsideration, *Exclusive Jurisdiction with Respect to Potential Violations of the Lowest Unit Charge Requirements of Section 315(b) of the Communications Act of 1934, As Amended*, 7 FCC Rcd 4123, 4125 ¶ 13 (1992); Memorandum Opinion and Order, *Midwestern Relay Co.*, 69 F.C.C.2d 409, 415-17 ¶ 12 n.25 (1978), *aff'd American Broad. Cos. v. FCC*, 643 F.2d 818 (D.C. Cir. 1980); Order, *Richman*

Finally, section 2(b)'s limitation of Commission authority over intrastate services is not a restriction on the Commission's authority to preempt state truth-in-billing regulations over wireless services. Section 2(b) specifically exempts wireless services from its scope.[127/] It therefore does not preclude the Commission's exercise of jurisdiction over such services.[128/] Further, section 332(c)(1) directs that CMRS services will be regulated as common carriers and prohibits the Commission from exempting such services from the requirements of section 201 of the Act. Because section 2(b) functions as a limitation on Commission (and not state) authority, section 332(c)(1) frees the Commission to regulate CMRS providers generally by directing that they be treated as common carriers under Title II without further qualification.[129/] The legislative history, moreover, makes clear that this was precisely Congress's intent,[130/] and the courts have agreed.[131/]

Bros. Records, Inc. v. U.S. Sprint Communications Co., Inc., 10 FCC Rcd 13639, 13641-42 ¶ 15 (1995).

127/ 47 U.S.C. § 152(b) ("[e]xcept as provided in . . . section 332").

128/ Moreover, section 301 clearly provides the Commission with authority over the use of wireless services within a state. *See* 47 U.S.C. § 301(a).

129/ *See generally* Leonard J. Kennedy & Heather A. Purcell, *Section 332 of the Communications Act of 1934: A Federal Regulatory Framework that is "Hog Tight, Horse High, and Bull Strong*," 50 Fed. Comm. L.J. 547 (1998).

130/ H.R. Conf. Rep. No. 103-213, at 497 (1993) (amendment of § 152(b) meant to "clarify that the Commission has the authority to regulate commercial mobile service"); *id.* at 490 (intent of § 332(c)(1)(A) "is to establish a Federal regulatory framework to govern the offering of *all* commercial mobile services") (emphasis added).

131/ In *Iowa Utilities Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *rev'd on other grounds sub. nom.*, *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999), the Eighth Circuit rejected the Commission's local pricing regulations based on the jurisdictional bar in section 2(b), but approved them with respect to CMRS providers. "Because Congress expressly amended section 2(b) to preclude state regulation of entry of and rates charged by [CMRS] providers and because section 332(c)(1)(B) gives the FCC the authority to order LECs to interconnect with CMRS

Even if section 2(b) applied to wireless services, and it does not, it still has no bearing on the Commission's preemptive authority. The Commission has already held that it has authority over intrastate wireless services based on the impossibility framework of *Louisiana PSC v. FCC*,[132] and may therefore preempt state regulation of such services.[133] That confidence is fully justified: wireless services are jurisdictionally mixed on the whole, and there generally is no straightforward way to distinguish between the "intrastate" and "interstate" portions of the service.[134] Services are sold in buckets of undifferentiated minutes; users are mobile and their location is not tracked for each call.[135] Thus, there is no way to permit the states to continue to regulate the *intrastate* portion of the service without regulating the interstate portion, justifying preemption on standard conflict principles — notwithstanding any supposed limitation in section 2(b).[136]

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carriers, we believe that the Commission has the authority to issue the rules of special concern to CMRS providers." *Id.* at 800 n.21 (citations omitted).

[132] 476 U.S. 355 (1986).

[133] *See Forbearance Order* at 1506 ¶ 257 n.517.

[134] *See, e.g.*, First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16017-18 ¶ 1044 (1996) (subsequent history omitted) (noting the difficulty of ascertaining the intra- or interstate nature of a CMRS call because "customers may travel from location to location during the course of a single call").

[135] *See id.*

[136] *Cf. Vonage Holdings Corp.* at 22418-19 ¶ 23.

CONCLUSION

The Commission has repeatedly recognized the benefits that flow to consumers from maintaining a highly competitive CMRS market. As carriers bring the next generation of innovation from the cutting edge to market ubiquity, it is essential that truth-in-billing regulations do not stand in the way. CTIA respectfully urges the Commission to protect the competitive market by implementing a flexible regulatory framework that requires carriers to communicate truthful information but lets customers decide which billing plans best serve their needs. Rigid prescriptive rules would only frustrate this process. Nor would the public interest be served by a patchwork of state-by-state truth-in-billing regulations. The Commission should therefore make clear that its rules provide an exclusive national framework for wireless billing.

Respectfully submitted,

/s/ Michael Altschul

Michael F. Altschul
Senior Vice President, General Counsel
CTIA – The Wireless Association™
1400 16th Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 785-0081

June 24, 2005